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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.,

Petitioners,

—v.—

SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF AMICUS CURIAE FOR FRIENDS OF ANIMALS, INC., IN SUPPORT OF PETITIONERS

HERMAN KAUFMAN
P.O. Box 352
Old Greenwich, CT 06870
(203) 637-5833

Attorney for Amicus Curiae

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Questions Presented

1. Whether, under the Endangered Species Act, which makes it unlawful to "take" any endangered or threatened species, and which further defines "take" to include "harm," the Regulation of the Secretary of Interior, defining "harm" as embracing habitat modification that either injures or kills wildlife is both valid and reasonable?

2. Whether the Secretary's Regulation, defining "harm" is mandated in order to reverse the trend of habitat modification (Destruction), imperiling many endangered species throughout the United States?

3. Whether the Court, if it sustains the validity of the Secretary's Regulation, defining "harm" should address, *sua sponte*, or require the parties to brief, the question, who ought to assume the costs of carrying out the Regulation?

4. Whether the resulting cost of halting habitat modification and restoring listed species must, in the final analysis, be shared?

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Statement

Friends of Animals, Inc., presents this brief, as Amicus Curiae, in support of the Secretary of Interior ("Secretary"), who argues that the Court should uphold the Regulation [50 C.F.R. 17.3], defining "harm," as used in Section 9 of the Endangered Species Act [16 U.S.C. Sec. 1538 (a) (1)], making it unlawful to "take" an endangered or threatened species. "Take," as used in the statute, includes "harm" in its definition.

The Regulation in question here defines "harm" as action that either kills or injures wildlife. Killing or injuring wildlife, the Regulation further provides, can result from habitat modification that includes significant impairing of behavioral patterns, breeding, feeding, or sheltering of wildlife.

At bar, the Secretary in enacting the Regulation, found that modification of critical habitat, "harming" endangered species, must be prevented to preserve wildlife and wildlife habitat.

Interest of Amicus

Friends of Animals, Inc., founded in 1957, is a not-for-profit animal protection group, representing in excess of 100,000 corporate members nationally and throughout the world.

Amicus has devoted a substantial portion of its activities to aiding endangered and threatened species on a global basis. Some of these activities are set forth below.

Amicus has donated private funds of its contributors to projects, seeking to preserve endangered species habitats.

Amicus has also received grants in aid from the federal Department of Interior for use in the protection of the elephant in habitat countries, covered by the African Elephant Conservation Act. Amicus became eligible for such grants in aid, after being approved as a qualified partner to administer both military surplus equipment and government grant funds for endangered species projects abroad. Amicus was thus "certified" as a participating "Private Voluntary Organization" by the United States Agency for International Development.

Amicus joined with the United States Department of Interior to adequately equip forest rangers in African countries with the resources necessary to protect listed species, e.g.,

endangered elephants (Denominated by the Department of Interior as endangered or threatened, see 50 C.F.R. 424).

Amicus has also participated heavily in the Department of Interior efforts to restore the wolf to the states of Idaho, Montana and Wyoming. This project will yield significant revenues from tourists, spurred by the opportunity to observe the wolf—this will largely offset certain expenses of the project itself.

Amicus's contributions consisted of hiring a wolf scientist to study for two years the wolf and its prey species. Also, Amicus financed certain public opinion polls, investigating the public receptiveness to the wolf restoration program in states in which the wolf's return was targeted. Amicus's efforts, in part, led Congress to appropriate funds for this purpose.

Summary of Argument

1. The declining wildlife habitat is causing an indisputable reduction in the population of endangered and threatened species, which, additionally, risk extinction because of lack of adequate feeding, breeding and shelter areas. The disappearance of species habitat is clearly traceable to the consistent and unwavering pattern of land and coastline commercial utilization in order to cope with the ever present pressures of economic development.

2. Solutions must be created to achieve the correct and proper balance between the legitimate, compelling need to restore and protect wildlife and a suitable environment, and the conflicting interest, which has long recognized a property owner's to utilize property consistent with the owner's reasonable investment expectations.

3. While the Secretary's Regulation, extending "harm" to cover habitat modification that kills or injures wildlife is eminently reasonable and necessary to reverse the trend of the progressive deterioration of species habitat, an equally com-

pelling and important issue, not be avoided here is the question, who must bear the cost of insuring and preserving this habitat. Shared responsibility for assuming these costs is the apparent answer.

4. The adverse effects of economic development of property upon species and their habitat is evident from even a bare microscopic view of specific instances in this country, including the Florida-Caribbean region; states in the south; southern border states; the Great Lakes and Pacific northwest sectors; and California and far-southwestern states. Declining habitat from development in these areas have led to diminished populations of the manatee in Florida; bat species in Kentucky and neighboring states; the black bear in Louisiana; the piping plover in the Great Lakes and Pacific northwest; and the desert tortoise in California and Nevada.

5. Destruction of island and narrow coastline habitats—"insular habitats"—have also impaired species, mainly birds, by reason of these species' inability to adapt to other habitat environments.

6. There is also an apparent decline in the population of migratory birds, on account of the deforestation of their southern habitat, the southern tropics, as well as the forest fragmentation in their spring and summer habitat, the northeast. Paralleling this are the vanishing coastlines, for example in Connecticut. Again, all of this has been brought about by the pressures of economic development.

7. Amidst the great clamoring of how to allocate the cost of wildlife and environment restoration and recovery, the choices here are limited. But it is not wise, in the view of Amicus, to impose on one party or group to the controversy the sole financial responsibility for the realization of a laudable goal, that, ultimately, will benefit all. In another context, apportioning the cost for the attainment and perfection of nuclear energy, the Supreme Court endorsed the principal that it (The cost) ought to be shared by all.

Argument

It is no longer in dispute that habitat modification (Destruction) has played a major, if not dominant, role both in the reduction and extinction of wildlife throughout the world. We speak here of the real, as opposed of the speculative, impact of this phenomenon [*American Bald Eagle* v. *Bahtti*, 9 F.3d 163 (1st Cir. 1993)].

Amicus strongly believes that, regardless of the outcome of this case, the magnitude of the decision cannot be overstated. It will, indeed, have incredibly far reaching effects.

Indisputably, habitat modification, as a factor jeopardizing wildlife, has resulted, to a significant degree, from the unwavering trend in America that places primary emphasis upon the optimal development of private property. Amicus harbors grave and deep concerns about the ever mounting tension between: (1) legitimate, urgent and compelling need to deploy specific steps and procedures that will adequately insure the protection of wildlife and wildlife habitat, which, in turn will promote the upkeep and preservation of the environment, and (2) the strong tradition in this country, recognizing the property owner's right to deploy and develop property consistent with the owner's reasonable investment expectations. Amicus views this and other proceedings (Judicial, legislative and administrative) as a device that will hopefully permit a productive search for solutions that, in the end, will assure an accommodation of both of these concerns.

The conflict between concerns for wildlife and the environment and the pressures to achieve the optimal level of property is not new. At bar, perhaps, the conflict has been brought to a head. Amicus believes, however, that this case offers a proper vehicle for the Court to go beyond the mere question of the validity of the Secretary's Regulation at issue here. Amicus, perhaps in a departure from orthodox advocacy, believes that the validity of the Regulation cannot and should not be divorced from the question, who ought to be responsible for bearing the costs of carrying out the Regulation,

assuming that the Court decides that the Secretary was empowered to enact it. In the paragraphs set forth below, we attempt a discussion of these points.

As the Court has recognized, habitat modification constitutes perhaps the greatest threat and obstacle to the enhancement of wildlife. [*TVA* v. *Hill*, 437 U.S. 153, 179 (1978)]; *see also Sierra Club* v. *Yeutter*, 926 F.2d 429 (4th Cir. 1991); *Palila* v. *Hawaii Dept. of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988), and 639 F.2d 495 (1981); *United States* v. *Glenn-Colusa Irrigation District*, 788 F. Supp. 1126 (E.D. Cal. 1992).

We here offer some of our observations, based upon past study, research and consultation, why the Secretary's Regulation should be upheld as an effective means to check the unrestrained modifications of wildlife habitat. While there exists wide familiarity with the impact of habitat modification upon the spotted owl (Well documented by the news media); the red cockaded woodpecker [*Sierra Club* v. *Yeutter*, *supra*]; and the snail darter [*TVA* v. *Hill*, *supra*; *United States* v. *Glenn-Colusa*, *supra*], numerous other wildlife, whose list is much too long to properly analyze here, are similarly imperiled.

First, wildlife experts divide species into two categories, "generalists" and "specialists." The former clearly possess the necessary flexibility to adapt to different living conditions, while the latter do not and are thus restricted to more confined habitat parameters, a circumstance brought about by the difficulty in locating food in a new habitat locale. Most endangered and threatened species fall into the "specialist" category, which poses the ominous risk of severe diminution of these particular species.

A. In the southeast section of the United States, particularly Florida and the Caribbean waters, several species are imperiled, including the Everglades fox squirrel, the Key Largo woodrat, the loggerhead turtle (Whose nesting beaches have been eroded by coastal development) and the manatee, a

whale like mammal, which is a sub-group of the West Indian species, valuable for eating vegetation that clog waterways.

The status of the manatee led to the creation of the "Save the Manatee Club," founded by the former Florida Governor, Bob Graham. At home in shallow water, the manatee's habitat has been disturbed by wetland fill and dredge, by-products of development activities, which, together with excessive watercraft activities have deprived the manatee of needed feeding areas.

B. In the southern border states, various species of the bat, the Indiana and grey bats, have diminished from intrusions with their hibernating habitat, caves, where the species spend from four to eight months, beginning in the fall. Normally, they sleep during the entire hibernating period and store enough fat to last until spring. Yet, if awakened by cave explorers, usually charged admission by commercial interests, the animal's metabolism will accelerate, prematurely using the reservoir of stored fats, which can often lead to starvation prior to the end of the hibernating period.

Another species in the south, the Louisiana black bear, found in Louisiana and Texas, has decreased in population by eighty per cent during this century, on account of excessive deforestation and the export agricultural development.

C. In the north and northwest sectors of the United States, diminished habitats have adversely affected the stellar sea lion (Alaska) and the Columbian white-tailed deer (Washington and Oregon). A vivid prototypical example of the "specialist" species, is the piping plover, found in the Great Lakes and northwest regions. Its very specific habitat requirements, gravelly shoreline and wetland locations, have deteriorated, again, from the pressures of land development and watercraft activity.

D. Too, other birds, harmed by habitat incursions, include the bald eagle, the ivory billed woodpecker, the sandhill crane and the Bahamian parrot, the latter being one of many birds, occupying island type or narrow, enclosed coastline areas.

The continued preservation of these "insular habitats" is essential for the well being of the particular species, who have no place to go, unable to handle other habitats.

The steady depletion of the New England coastline is also of great concern to wildlife protectors. In Connecticut, thirty percent of the state's wetland tidal areas have been lost to development. Observers have also noted that migratory birds, which leave the northeast for the south in winter, have dwindled because of deforestation in the southern tropics and fragmentation of northeastern forests—for development purposes.

E. In the south and far western United States, habitat modification has led to population declines of the San Joaquin kit fox and the desert tortoise. Indeed, the tortoise has undergone a ninety per cent loss of population, as a result of continuous development and highway construction.

The foregoing discussion presents a mere microscopic view of the ongoing endangered habitat deterioration on a national (and global) level. In truth, it is probable that entire ecosystems are presently greatly at risk, see New York *Times*, February 14, 1995, "Latest Endangered Species: Natural Habitats," P. A-1, Cols. 5-6.

Yet, the harder question is who must pay the cost of wildlife and environment restoration, now a very heated topic, both in the courts [*Lucas* v. *South Carolina Coastal Council*, 112 S Ct. 2808 (1992); *Dolan* v. *City of Tigard*, 129 L Ed. 2d 304 (1994); *Seattle* v. *Audobon Soc'y.*, 92 Civ. 479 WD (W. D. Wash)], and in Congress [E.g., House Bill H.R. # 9]. No doubt, the cost of recovering a single endangered species is exhorbitant by any standard. Realizing this, property owners are clamoring for payment, compensation for intrusions with the commercial exploitation and utilization of their properties. And, there is presently pending in Congress a multitude of proposals, requiring that any regulation, restricting the use of private property withstand a "cost-benefit" analysis, prior to its implementation, House Bill, H.R. # 9, supra.

Undeniably, a decision, upholding the regulation at issue here, cannot be divorced from the gnawing concern, who must pay for the regulation's enforcement. So far as the judiciary is concerned, limited alternatives are available.

Amicus believes that it is not, however, a question of either placing the onus entirely on the property owner, in the form of property use restrictions, which would surely be deplored by property rights advocates; or, simply rewarding the property owner by compensating him for a "taking" resulting from the restrictions necessary to achieve the goal of halting habitat modification, *Lucas* v. *South Carolina Coastal Council*, *supra* (Realistically, however, a "taking" here would be difficult to establish, since it appears that Respondents' property has not been the subject of a total regulatory taking, depriving Respondents of the complete economically viable use of their land).

Neither alternative affords an adequate long term solution. In the final analysis, it is not a question of "either . . . or." Rather, property advocates and wildlife proponents must pursue joint and meaningful solutions. For, the use, efficient utilization and ultimate enjoyment of property cannot be achieved without concerns for wildlife and its environmental components. Otherwise, what today is simply urban blight will surely turn into urban rubble in the future.

Sharing the cost and upkeep of the environment is an idea suggested by this Court in another context, *see Duke* v. *Env. Carolina Env. Study Group*, 438 U.S. 59 (1978) (Requiring private citizens to accept limited, capped damage awards for injuries, stemming from nuclear accidents). In this context, the goal of attaining and perfecting nuclear energy ought to be viewed from the same standpoint as the objective of wildlife and wildlife habitat preservation. In the case of either goal, there must be shared responsibility; otherwise, the unending battles among rival interests will lead to the goal not being attained at all. *Compare*, *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104 (1978).

Conclusion

The judgment below should be reversed and remanded.

Respectfully submitted:

Herman Kaufman
P.O. Box 353
Old Greenwich, CT 06870
(203) 637-5833

Attorney for Amicus Curiae

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